UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:	
SHOOK & FLETCHER INSULATION CO.,	**Case No.: 02-02771-BGC-11**
Debtor-in-Possession.	**Chapter 11**

MOTION IN LIMINE

Travelers Casualty & Surety Company ("Travelers"), by and through its undersigned counsel, respectfully submits this motion seeking an Order excluding the testimony of Mr. Scott D. Gilbert. The grounds for this motion are set out below.

BACKGROUND

The Debtor, Shook & Fletcher Insulation Co. ("Shook") has proffered one of its lawyers, Scott D. Gilbert, as its "expert" on a number of topics. All of the opinions that Mr. Gilbert has offered on these topics are, without exception, merely the conclusions of one of Shook's lawyers as to the legal implications of Travelers conduct under the relevant insurance agreements and the Wellington Agreement. For example, at his deposition Mr. Gilbert offered his opinion on such matters as (i) the application of the Wellington Agreement to the facts at hand; (ii) the application of Section XX of the Wellington Agreement to the facts at hand; and (iii) the number of claims made against Shook that trigger Travelers alleged legal obligations pursuant to the Wellington Agreement. *See* Transcript of Deposition of Scott D. Gilbert ("Gilbert Dep."), attached as Exhibit A, at 23, 24, 110-11. Each of these opinions is nothing

more than the legal opinion of a lawyer (who also happens to be a lawyer for one of the parties) applying certain contracts to a certain set of facts.

At his deposition, Mr. Gilbert affirmed several times exactly what Travelers now asserts: that his "expert" opinions were nothing more than his opinions as a lawyer as to the legal implications of Travelers conduct. For example, after he had given his opinion that most of the claims against Shook trigger Travelers coverage obligations, Mr. Gilbert was asked whether there was "anything that you've just told me with respect to your opinion that is anything other than a legal opinion by a lawyer applying a contract to a certain set of facts?" Gilbert Dep. at 110-111. He responded that "[w]ith respect to pending cases where exposure periods are available, I think the answer is no . . .." *Id.* at 111. Shortly thereafter, Mr. Gilbert agreed that his opinion as to Travelers liability for future claims made against Shook "is a legal opinion and application of the Wellington Agreement, that's all that is . . .." *Id.* at 112-113. Mr. Gilbert later described another of his opinions as "the application of the Wellington Agreement to these facts and also to the different Wellington carriers involved in this and the nonsignatories who had settled and who are not settled." *Id.* at 117. Finally, toward the end of his deposition, Travelers again asked Mr. Gilbert with respect to his opinion on Travelers Section XX claim whether he was simply "setting forth a legal opinion with respect to the effect on the party's contractual obligation from the breach by the other party in the contract?" *Id.* at 204. Mr. Gilbert again responded that "[i]n this particular case, yes." *Id.*

Given these facts, Travelers would respectfully request that Mr. Gilbert be excluded from testifying and from offering any more "expert" opinions in these proceedings.

ARGUMENT

1. Experts may not testify as to the legal implications of conduct.

In the Eleventh Circuit and Alabama, the law is very clear that an expert witness may not testify as to the legal implications of conduct; "the court must be the . . . only source of law." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (applying Florida law) (citing Fed. R. Evid. 704) (holding that in an insured's action against his fiduciary responsibility insurer, expert testimony that the insurer had a duty to hire tax counsel for its insured was a legal conclusion which should not have been admitted by the district court); *see also KW Plastics v. U.S. Can Co.,* 199 F.R.D. 687, 695 (M.D. Ala. 2000) (holding that an expert would not be allowed to testify as to the legal effects of a merger between two companies); *Strickland v. Royal Lubricant Co., Inc.,* 911 F. Supp. 1460, 1469 (M.D. Ala. 1995) (holding that an expert's opinion that the absence of an instruction to wear a respirator renders a warning "inadequate" as that term is defined under Alabama law would not be admissible because it would constitute an attempt to instruct on the application of the law concerning a failure-to-warn claim and the legal implications of the defendant's conduct); *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465, 1476 (N.D. Ala. 1994) (holding that an expert's testimony in the form of "a dissertation of the law as it related to this case" was properly excluded because "[d]ecisions regarding questions of applicable law are the province of the court.").

Lawyers like Mr. Gilbert are duty-bound by the ethical rules to zealously advocate their client's position. Thus, it is impossible for Mr. Gilbert to be even remotely objective while acting as an "expert" in this matter and still fulfill his professional responsibilities to his client. It is for reasons such as these that lawyers are not allowed to serve as "expert witnesses" on behalf of their clients. If lawyers were allowed to testify as experts for

their own clients and offer their opinion that the other side owed money to their client, then surely the courts would be clogged with lawyers masquerading as experts and doing just that. But the Eleventh Circuit and Alabama clearly require lawyers to act only as advocates and to leave the expert testimony to others. There does not seem to be any real argument that Mr. Gilbert's testimony is anything more than his opinion as a lawyer for one of the parties as to the legal implications of Travelers conduct. As such, this testimony should be excluded.

2. Mr. Gilbert's testimony also is inadmissible because his expertise is based only on his experiences, and because he did not review all of the relevant data.

Mr. Gilbert's expert testimony fails for other reasons as well. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95 (1993), the Supreme Court stressed that the trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the [expert's] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue," and that the "overarching subject [of the assessment] is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." In *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999), the Court held that the *Daubert* standard applied to non-scientific expert testimony as well. Mr. Gilbert's testimony should be excluded under the principles set out in these two cases and the Eleventh Circuit cases applying them.

Mr. Gilbert testified that what separates his opinions from those of all the other lawyers in this case are his experiences as an insurance lawyer. *See, e.g.*, Gilbert Dep. at 21-22 ("I imagine what I would bring to the education of the court and I've brought in other cases and what differentiates me from most of the advocates involved in this is more than two decades of experience in dealing with these issues at every level . . .."). First, these experiences, however

extensive, are the experiences of a lifelong advocate for insurance policyholders. They accordingly make it impossible for Mr. Gilbert to be viewed as anything remotely like an objective expert when it comes to his offering opinions on the availability of insurance coverage for one of his policyholders. *See id* at 22 ("[I have] worked with and observed companies in Shook's situation and companies in different situations, . . . [I have seen] the impact as it relates to the plaintiffs' bar, with whom we are very, very familiar and with whom I probably have more of an established relationship than any other single lawyer dealing with insurance issues . . .."). Moreover, the Eleventh Circuit very recently noted that the Supreme Court has "made it clear that testimony based solely on the experience of an expert would not be admissible." *Rider v. Sandoz Pharmaceuticals Corp.*, 2002 WL 1362182, at *3 (11th Cir. June 24, 2002) (citing *Kumho*, 526 U.S. at 157). The expert's conclusions must be based on sound principles and the expert's discipline itself must be a reliable one. *Rider*, 2002 WL 1362182, at *3. While Travelers does not question the reliability of lawyering as a profession, it cannot see how one lawyer's experiences qualify him as more of an expert in contract interpretation and insurance law than all the other lawyers involved in this matter. Furthermore, given that the substance of an expert's testimony has to address matters beyond the ken of the factfinder, Mr. Gilbert's contractual interpretations of the relevant agreements are not helpful to this court because such interpretations obviously are not beyond its ken. *See, e.g., Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) ("[F]or expert testimony to be admissible . . . the proponent of the testimony must show that . . . the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.").[1]

[1] Mr. Gilbert's testimony as to the meaning of the Wellington Agreement is also inadmissible pursuant to the very terms of that Agreement, which provide that "[i]n any dispute involving the agreement or the appendices hereto no signatory shall introduce evidence of or

The advisory committee notes to Rule 702 also help clarify the trial court's role in evaluating testimony like Mr. Gilbert's, which is based "solely or primarily on experience." *KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001) (quoting Fed. R. Evid. 702 advisory committee notes). According to the committee:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply taking the expert's word for it.

KW Plastics, 131 F. Supp. 2d at 1292 (quoting Fed. R. Evid. 702). As one court in the Middle District of Alabama recently stated, "the plain language of new Rule 702, as well as the advisory committee notes to the new Rule, makes it clear that the court is now *obliged* to screen expert testimony to ensure it stems from, not just a reliable methodology, but also a sufficient factual basis and reliable application of the methodology to the facts." *Rudd v. General Motors Corp.*, 127 F. Supp. 2d 1330, 1337 (M.D. Ala. 2001) (emphasis in original); *see also KW Plastics*, 131 F. Supp. 2d at 1293-94 (excluding the testimony of an expert who based his opinion only on his subjective beliefs and who did not consult the relevant documents because he "knew" his opinion to be correct).

Other than his experiences as a plaintiffs' insurance lawyer, Mr. Gilbert was unable to articulate with any degree of specificity what the unique basis for his conclusions regarding the legal implications of Travelers' conduct under the relevant agreements was. "This inability [makes] it next to impossible for the court to ascertain with any degree of confidence the reliability of [Mr. Gilbert's] method --- both in terms of the underlying data and in terms of

---

seek to compel testimony concerning any oral or written communication made prior to June 19, 1985 with respect to the negotiation and preparation of this agreement." *See* Gilbert. Dep. at 30-31.

its application." *KW Plastics*, 131 F. Supp. 2d 1294 (quoting *Cayuga Indian Nation of N.Y. v. Pataki*, 83 F. Supp. 2d 318, 324-25 (N.D.N.Y. 2000) (excluding expert's property appraisal that relied partially, but not wholly, upon an "intuitive approach.")) Of course, Mr. Gilbert has read the contracts at question, but so have all of the other lawyers involved in this matter. Under the guidelines established by *Kumho Tire*, experts who can only claim experience as the factor that separates their opinion from those of other "experts" (if lawyers are to be considered experts) should have their testimony excluded.

Mr. Gilbert's "expert" testimony also suffers from an extraordinarily inadequate factual basis. First, Travelers discovered at Mr. Gilbert's deposition that many of the "facts" he used in formulating his expert opinions came from his partner, Richard Shore. As Mr. Gilbert admitted on several occasions, he relied on his partner Mr. Shore's interpretation of much of the available data in these proceedings, and did not review this data himself. *See, e.g.*, Gilbert Dep. at 103-04 ("[My opinion is] based upon Mr. Shore's representations to me of what he's seen from the CCR in the way of claim information and data . . . Q: Have you looked at any of the data? A: Not yet. . . . Q: What data do you plan to look at? . . . [A:] I will find out from Mr. Shore what is available and make a judgment as to what I need to look at."); 107 ("Q: So, what is the basis for your opinion as it's set forth in 7(a) with respect to future claimants? A: My discussions with Mr. Shore, his representations to me based upon the data that he's reviewed."); 197-98 ("Q: What is that understanding [of Travelers Section XX claim] based upon? A: Based upon my discussions recently and over time on this issue with Richard Shore, who had been primarily responsible for handling the issue."). Second, Mr. Gilbert admitted that he had not even reviewed (or had Mr. Shore review for him) all of the available and relevant data in this case. *See, e.g.,* Gilbert Dep. at 105 ("Q: You have not looked at any claim files I take it in

connection with this opinion? A: Not yet. Q: Have you seen or looked at any data runs from the CCR that contain projections of Shook's liabilities? A: Not that I recall.").

Mr. Gilbert also admitted to Travelers that he spent only around six to eight hours preparing his opinions in this case, and that Mr. Shore and Jayne Conroy (an attorney who represented Mr. Gilbert at his deposition) "had input" into his expert report. *See id.* at 19, 38 (Q: Approximately how many hours did you spend in preparing your opinions in this case? A: . . . Most recently probably six to eight hours."). Obviously, expert opinions are more reliable if the experts put more than six to eight hours into them and if these reports are formed after a full review of the pertinent facts. Courts do not give a lot of credence to expert reports that are drafted in one day and in large part by an expert's partners and attorneys, after the expert has had a few discussions with his law partner and glanced at some part of the relevant data. *See, e.g., KW Plastics*, 131 F. Supp. 2d at 1295 ("[I]t is [the expert's] failure to give more than fleeting thought to numerous matters that are relevant to [his report] that renders his testimony unreliable and irrelevant."); *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) ("An expert must 'substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless.'" (quotation omitted)); *Garay v. Missouri Pac. R.R. Co.*, 60 F. Supp. 2d 1168, 1172-73 (D. Kan. 1999) (excluding expert report that failed to consider various crucial pieces of evidence); *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 179 F.R.D. 450, 459-62 (D.N.J. 1998) (excluding the testimony of an expert who relied on the inaccurate statements of others and made several "dubious assumptions" when formulating his opinion). Mr. Gilbert's failure to review all the relevant information and his reliance on his discussions with his partners and his partner's review of a large part of the relevant information is yet another reason why his testimony should be excluded.

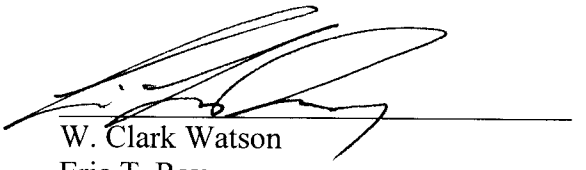
3. Mr. Gilbert's testimony should be excluded because he has not disclosed all the data he considered when reaching his opinions.

As Travelers recently filed Motion to Compel makes plain, Mr. Gilbert has not disclosed all of the data he considered when reaching his expert opinion. This is yet another reason why his testimony should be excluded. Alabama courts will exclude an expert's proffered testimony when the requirements of Fed. R. Civ. P. 26 are not strictly adhered to. *See, e.g., KW Plastics,* 131 F.Supp.2d at 1296 (excluding an expert's unjust enrichment calculations because "[a]t no time prior to the court's order, or in any of [the expert's] earlier three reports, or in any of [the party's] earlier pleadings, did [the party] seek to quantify damages on an unjust enrichment basis. . . . To allow [the expert] to testify as to unjust enrichment when he has never shown any prior inclination for doing so, would reward [the party] for its misdeeds and countenance an end-run around the Federal Rules of Civil Procedure and the orders of the court."); *Williams v. Roberts*, 202 F.R.D. 294, 296 (M.D. Ala. 2001) (strictly limiting testimony of experts and describing as "woefully inadequate" their cursory expert report, which contained very little elaboration and did not include the studies, materials, or test results relied upon by them).

CONCLUSION

WHEREFORE, Travelers respectfully requests that this Court enter an Order excluding the testimony of Scott D. Gilbert.

Respectfully Submitted this 15th day of July, 2002.



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I hereby certify that I have served a true and correct copy of the foregoing on

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OF COUNSEL

585305.1

EXHIBIT "A"

ORIGINAL

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA

In re	
SHOOK & FLETCHER INSULATION CO.	No. 02-02771BGC11
Debtor-in-Possession.	

Washington, D.C.

Wednesday, July 3, 2002

Deposition of

SCOTT D. GILBERT

a witness, called for examination by counsel for Travelers Casualty and Surety Company, pursuant to notice and agreement of counsel, beginning at approximately 10:00 a.m. at the law offices of Gilbert Heintz & Randolph, L.L.P., 1100 New York Avenue, Northwest, Washington, D.C., before Shari R. Broussard of Beta Reporting & Videography Services, notary public in and for the District of Columbia, when present on behalf of the respective parties:

CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Shari R. Broussard, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the foregoing transcript is true and accurate record of the testimony given by the said witness.

I further certify that I am not related to any of the parties to the action by blood or marriage and I am in no way interested in the outcome of this matter.

Shari R. Broussard

My Commission Expires:

July 14, 2005

if it had merit to it, is miniscule in comparison to Travelers' actual liability in this case and with that in mind discussed the different subjects that I might be prepared to testify about. This report was then prepared on the basis of those discussions.

Q Who prepared the report?

A I believe that Ms. Conroy had input into it, Richard Shore had input into it, I don't know if other individuals edited it or not. I had input into it and reviewed it and was comfortable with it and signed it.

Q Who was the principal drafter?

A I don't know. At our firm people do things and they give them to me and I review them and if I'm comfortable with them, I sign them.

Q You were not the principal drafter?

A No.

testimony as an expert?

A Other than the purpose being to educate the court, no.

Q What is your understanding of the purpose of your testimony as an expert?

A I've answered that already.

Q To educate the court?

A To educate the court about these issues and the potential magnitude and scope of Travelers' liability to Shook under its policies, the Wellington Agreement and the law.

Q Now, is there any aspect of your testimony that you intend to provide to educate the court that could not be presented by a legal advocate representing Shook as an attorney in the courtroom?

A Certainly or I wouldn't be doing this.

Q What are those things?

A I imagine what I would bring to the education of the court and I've brought

in other cases and what differentiates me from most of the advocates involved in this is more than two decades of experience in dealing with these issues at every level, having worked with and observed companies in Shook's situation and companies in different situations, having worked with Travelers during that entire period, being very familiar with Travelers' approach to the position Travelers has taken in various litigations and in other matters, dealing with the application of the Wellington Agreement, which I negotiated and wrote, the effect on Shook & Fletcher, what's happening in the tort system where there's no other single individual more involved with asbestos than I, the impact as it relates to the plaintiffs' bar, with whom we are very, very familiar and with whom I probably have more of an established relationship than any other single lawyer dealing with insurance issues, and I think it's that -- that

breadth and richness that would assist the court in this regard in understanding fully the kinds of issues that we're discussing here.

Obviously if I believed that I would simply be repeating what would be written in a brief or argued by a partner, this would be an utter waste of my time and the court's time and I have no interest in doing either of those.

Q We'll go through opinion by opinion, but that was very helpful. I appreciate it.

Will some of your opinions include your opinion on the application of a contract, the Wellington Agreement, to the situation presented in this case?

A Yes.

Q Will some of your opinions include the application of a series of contracts, the Aetna/Travelers policies, to the situation presented in this case?

A Yes.

Q Particularly with respect to Section 20, will your opinions include your opinion as to the application of Section 20 of the Wellington Agreement to the situation presented in this case?

A Yes.

Q Now, you're familiar with the firm Simpson Thatcher; is that right?

A Yes.

Q You're familiar with an individual by the name of Barry Ostrager?

A Is he that little red-headed guy?

Q Do you remember dealing with him over the years?

A Oh, yes.

Q Do you have an opinion of his ability as an insurance coverage lawyer?

A Yes.

Q What is your opinion?

A I think he is a very zealous advocate for his client.

identification.)

BY MR. ROCAP:

Q Let's look at page 15, Section 22.1.

A Okay.

Q In the middle of Section 1 it says, "In any dispute involving the agreement or the appendices hereto no signatory shall introduce evidence of or seek to compel testimony concerning any oral or written communication made prior to June 19, 1985 with respect to the negotiation and preparation of this agreement."

Now, first of all, is Shook the signatory to the Wellington Agreement?

A Yes.

Q Does Shook intend to abide by that obligation?

A My understanding is that Shook has and will continue to abide by all of its obligations under the Wellington Agreement.

Q Is any part of your testimony going to include any oral or written communication made prior to June 19, 1985 with respect to the negotiation and preparation of the agreement?

A I've already answered your question. I haven't decided that.

Q Well, if you decided yes, would that be a violation of this term?

A If my testimony is being compelled by you, it would be a violation and if Shook was introducing evidence, it would be a violation.

Again, if you go back and look at the different judges who have considered this issue, there are questions about the breadth of what an oral or written communication concerning negotiation and preparation is and it's been substantively debated and it's been ruled upon.

As you well know, I mean there have been a lot of disputes about this and

particularly if he's relying upon them.

MS. CONROY: That may clear up a lot.

MR. ROCAP: Yes. You would be surprised.

THE WITNESS: Can we go off the record for a second?

MR. ROCAP: Sure.

(Discussion off the record)

BY MR. ROCAP:

Q Approximately how many hours did you spend in preparing your opinions in this case?

A How many hours are there in 22 years? I couldn't multiply that high. Most recently probably six to eight hours.

Q Okay.

A That's the difference between an expert and an advocate.

Q Now, you are, as I mentioned before or asked you before and you verified that Gilbert Heintz is, in fact,

opinion?

A I'm relying on my understanding of the Wellington Agreement and my understanding from discussing this with colleagues who were very familiar with the -- the exposure periods of the Shook claims, that a very, very, high percentage, and I don't know the precise percentage, of the claims would have an exposure period under Wellington that overlaps with the Travelers coverage.

Q When you say it's based on your discussions with colleagues, what do you mean?

A Richard Shore and others.

Q I see. So your opinion is based upon Mr. Shore telling you that this is correct?

MS. CONROY: Object to the form.

THE WITNESS: It's based upon Mr. Shore's representations to me of what he's seen from the CCR in the way of claim

information and data and what people have looked at in terms of the potential exposure of Travelers vis-a-vis the Wellington triggers.

BY MR. ROCAP:

Q Have you looked at any of that data?

A Not yet.

Q Do you plan to?

A Yes.

Q What data do you plan to look at?

A I will sit down with Mr. Shore and determine where the data is most readily available and take a look at it.

Q So you'll look at what Mr. Shore asks you to look at?

A No, I will find out from Mr. Shore what's is available and make a judgment as to what I need to look at.

Q Again, we'd make a request that, since that has not been done in connection with the expert report, that we be told if

and when that determination has been made so we can reopen the deposition.

You have not looked at any claim files I take it in connection with this opinion?

A Not yet.

Q Have you seen or looked at any data runs from the CCR that contain projections of Shook's liabilities?

A Not that I recall.

Q Have you seen or looked at any data runs or any other information that would inform your opinion with respect to future claims?

A I've looked at Wellington in connection with settlement negotiations with Travelers, but I don't remember what they were.

Q Is there any projection that you're aware of as to the likely exposure demographics for future claimants?

A Again, other than in the context

know.

Q Have you asked that question of Shook?

A I have not personally, no.

Q So what is the basis for your opinion as it's set forth in 7(a) with respect to future claimants?

A My discussions with Mr. Shore, his representations to me based upon the data that he's reviewed.

Q Has he told you that he's reviewed any data with respect to future claimants?

A I know that Mr. Shore put together a brief analysis and I think maybe he used consultants in doing that for purposes of settlement with Travelers, which I referred to already, and beyond that I don't know.

Q Did that relate to future claimants?

A Yes. It was a really big number if I remember.

Q If it came from Richard, I'm sure

likely exposure demographic for future claimants is?

A I think it depends in part on what form the bankruptcy plan takes, what the claims procedures look like and what else is happening in the tort system at the time. All of those things are factors. All I can tell you is that every study I've ever seen on asbestos has turned out to be low in terms of potential liability of any company.

Q I'm just --

A But I don't -- I wouldn't begin to speculate.

Q Is there anything else that you're relying upon for this first opinion that, "Most, if not all, of the debtors asbestos-related bodily injury claims 'trigger' the coverage obligations of one or more of the Travelers policies"?

A No.

Q Now, is there anything that you've just told me with respect to your opinion

that is anything other than a legal opinion by a lawyer applying a contract to a certain set of facts?

A With respect to pending cases where exposure periods are available, I think the answer is no, but you and I would probably agree on what cases trigger Travelers under the Wellington Agreement.

Q Scary thought.

A With respect to the -- with respect to the future, I think in looking at the data, judging its credibility, being able to compare it with what has happened to other companies in similar or different circumstances and then making judgments about what could happen down the road, I think that that is different than a lawyer simply opining as to the application of a contract with a set of facts.

Q Does the last part of your answer refer to the likely exposure demographic that you expect to see for future claimants?

A I think the -- I think the issue is going to be, in terms of a UNR outcome, how one makes a judgment as to what the liability is that's ultimately transferred. Now, as a matter of insurance law, we don't need to make that judgment sitting here, I mean, and we don't need to debate what the future claims would look like because my view is that, you know, Travelers has a substantial obligation based on pending cases that warrants its interest claim, putting future claims aside, and that its future liability is likely to be substantial, but we don't need to agree or disagree on what that is because Travelers' obligation is a continuing obligation under the policies. I think my view on occurrence is correct, Travelers will pay indefinitely, as long as there are future cases, up to the amounts it's obligated to pay under its policies regardless of which statistician is correct. So --

Q Well, your answer there is that is your legal opinion of the way the policies work; is that right, what you just told me?

A My opinion of the way the policies work pursuant to Wellington Agreement, which I've got to say, I mean, I believe is a fairly noncontroversial issue. I think any -- I will tell you anybody substantially involved in Wellington who has the exposure periods for the claims and could look at the Travelers' coverage chart would be able to look at how many of those claims triggered the Travelers policies.

Q That is a legal opinion and application of the Wellington Agreement, that's all that is; is that right?

A Yeah, I viewed this less as an opinion and more as a statement of fact.

Q I see.

A It's a factual predicate.

Q Right, and that's my question. It goes to the factual predicate. My question

I think that the -- some of the analyses that were done were done by people I would consider to be competent in that area.

Q Those are the studies that we're going to have produced I take it.

A That you requested.

Q Okay.

A But, again, my view is it is what it is.

Q Now, let's look at the last two sentences of 7(a).

A Yes.

Q Just read those to yourself, if you will.

A Yes.

Q First of all, is that simply a statement of your opinion as to the terms of the Wellington Agreement?

A It's my opinion of the application of the Wellington Agreement to these facts and also to the different Wellington carriers involved in this and the

remember in what respect, Jim, if that was -- if it was an expert or factual or how it was limited, so that would be the one that comes to mind. Otherwise, I'm not aware of a situation where it's actually been limited in any way.

Q Let's move on to the Section XX interest claim, which is paragraph (e) of section 7 of your report. You state in the first sentence, "With respect to Travelers' claim against the debtor for interest under Section XX of the Wellington Agreement, it is my understanding that Travelers never has fully articulated the basis for its claim or actively pursued it." I take it that's not a statement of an opinion, that is a statement of an understanding?

A Correct.

Q What is that understanding based upon?

A Based upon my discussions recently and over time on this issue with Richard

Shore, who had been primarily responsible for handling the issue.

Q What has Richard told you that has led you to this understanding?

A That while Travelers has made a claim for approximately $2 million in interest, Travelers has never explained the basis on which it calculated that interest or why it thinks that interest is due and has never actively pursued it. I think the suit has been pending for a long time and, you know, but for what else is going on, our expectation was we wouldn't see it again, so it's been dormant for a long time.

Q Is it your understanding that the Section XX interest claim was a subject of settlement negotiations between the parties from early 2000 until June of 2001?

A I don't remember expressly, but now that you mention it, I would expect it was part of that deal.

Q Do you have an opinion as to the

breach?

A Not that comes to mind, no. I'm sure there were.

Q Well, what is your --

A I'm kidding.

Q The term "fundamental breach" is in your opinion. I just want to make sure I've got it all here.

A It's the Section XX breach, yes.

Q Now, are you in this particular sentence setting forth a legal opinion with respect to the effect on the party's contractual obligation from the breach by the other party in the contract?

A In this --

MS. CONROY: What sentence is that?

MR. ROCAP: The sentence that begins, "Moreover."

THE WITNESS: In this particular case, yes.

BY MR. ROCAP: